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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES CLAYTON MCCURDY,

Defendant and Appellant.

A149417, A151358

(Napa County
Super. Ct. No. CR157198)

Defendant James McCurdy pleaded no contest to one count of heroin transportation and admitted to three sentence enhancements under Penal Code section 667.5, subdivision (b) (section 667.5(b)) based on his having served prior prison terms for felony convictions.¹ After the passage of Proposition 47 (The Safe Neighborhoods and Schools Act), he successfully applied for resentencing on one of those prior convictions, a 2009 conviction for a drug offense, and the offense was reduced to a misdemeanor. He then petitioned to strike the section 667.5(b) sentence enhancement imposed in this case based on the 2009 conviction, and the trial court denied the petition.²

¹ All further statutory references are to the Penal Code unless otherwise noted.

² In appeal no. A149417, McCurdy appeals from a September 13, 2016 order denying his request to reduce the heroin transportation conviction in this case to a misdemeanor. We ordered that appeal consolidated with appeal no. A151358, which is his appeal from a May 12, 2017 order denying his petition to strike one of the section 667.5(b) enhancements. His briefing does not raise any claims involving the September 2016 order, and we do not discuss it further.

Our state Supreme Court is currently considering whether a sentence enhancement under section 667.5(b) must be stricken when the offense that forms the basis of the enhancement is subsequently reduced to a misdemeanor under Proposition 47. (*People v. Valenzuela* (2016) 244 Cal.App.4th 692, review granted Mar. 30, 2016, S232900.) Pending a decision in *Valenzuela*, we join the other Courts of Appeal that have addressed the issue and conclude that Proposition 47 does not have such a retroactive effect. We therefore conclude that the trial court properly declined to strike the enhancement and affirm.

I.
FACTUAL AND PROCEDURAL
BACKGROUND

The facts underlying McCurdy's conviction are not relevant to the issues on appeal. In June 2011, the Napa County District Attorney filed an information charging McCurdy with felony counts of heroin possession and heroin transportation.³ The information also alleged that he had a prior strike and three felony convictions with a prior prison term under section 667.5(b), including a 2009 conviction for possession of a controlled substance.⁴ As part of a negotiated plea, he pleaded no contest to the transportation count and admitted the three section 667.5(b) allegations, and the possession count and prior-strike allegation were dismissed.

In August 2011, the trial court sentenced McCurdy to a total term of seven years in prison, comprised of terms of four years for the transportation conviction and consecutive terms of one year each for the prior prison terms. The court suspended execution of the sentence and placed him on five years of formal probation.

³ The charges were brought under Health and Safety Code sections 11350, subdivision (a) (possession) and 11352, subdivision (a) (transportation).

⁴ The prior strike allegation was made under sections 667, subdivisions (b) through (i) and 1170.12, subdivisions (a) through (d). The 2009 conviction for possession of a controlled substance was under Health and Safety Code section 11377, subdivision (a).

Two years later, in October 2013, the trial court granted the probation department's motion to transfer the case to Sonoma County, where McCurdy had moved. The parties agree that in June 2014, the Sonoma County trial court terminated his probation and executed the seven-year prison sentence.

Later that year, the voters approved Proposition 47, and it took effect on November 5, 2014. (*People v. Valencia* (2017) 3 Cal.5th 347, 368.) Among the offenses that Proposition 47 reduced to misdemeanors is the possession offense of which McCurdy was convicted in 2009. (§ 1170.18, subd. (a); see Health & Saf. Code, § 11377.) Relying on Proposition 47, McCurdy eventually filed an application in the Napa County trial court to reduce the possession offense underlying the 2009 conviction to a misdemeanor, and the application was granted. He then filed a petition to strike the section 667.5(b) enhancement based on the 2009 conviction, and the petition was denied.⁵

II. DISCUSSION

McCurdy contends that the offense underlying his 2009 conviction could no longer support a prior-prison-term enhancement under section 667.5(b) once it was reduced to a misdemeanor. We are not persuaded.

Section 667.5(b) provides that under certain circumstances when the current offense is a felony, the trial court “shall impose a one-year term for each prior separate prison term . . . imposed . . . for any felony.” “ ‘Imposition of a sentence enhancement under . . . section 667.5[(b)] requires proof that the defendant: (1) was previously convicted of a felony; (2) was imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison

⁵ McCurdy points out that the proper venue for filing a petition to recall a sentence under Proposition 47 is unclear when, as here, the case was transferred to another county for probation, an issue currently pending before our state Supreme Court. (*People v. Adelman* (2016) 2 Cal.App.5th 1188, review granted Nov. 9, 2016, S237602.) But we need not resolve any potential venue issue here because the Attorney General concedes that McCurdy's petition “was properly filed with the Napa County Superior Court.”

custody and the commission of a new offense resulting in a felony conviction.’ ” (*In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) McCurdy does not contest that his 2009 conviction met all four elements of section 667.5(b) at the time the enhancement was imposed. Instead, he argues that under section 1170.18, subdivision (k) (section 1170.18(k)), which provides that any offense reduced to a misdemeanor under Proposition 47 “shall be considered a misdemeanor for all purposes,” the 2009 conviction no longer satisfies the first element.

Under section 1170.18, subdivisions (a) and (b), a person serving a sentence for a felony conviction who would have been guilty of a misdemeanor under Proposition 47 may petition for a recall of sentence to request resentencing, and the trial court shall grant the petition if certain conditions have been met. Subdivisions (f) and (g) provide a similar procedure for a person who has completed a sentence for a felony conviction to file an application to have the felony designated as a misdemeanor. Any felony conviction that is reduced to a misdemeanor under these provisions “shall be considered a misdemeanor for all purposes.” (§ 1170.18(k).) Numerous Court of Appeal decisions have concluded that these provisions do not include a procedure for striking sentencing enhancements and that Proposition 47 does not apply retroactively to invalidate enhancements under section 667.5(b) based on the language of section 1170.18(k). (E.g., *In re Diaz* (2017) 8 Cal.App.5th 812, 817-818, review granted May 10, 2017, S240888; *People v. Johnson* (2017) 8 Cal.App.5th 111, 115, review granted Apr. 12, 2017, S240509; *People v. Jones* (2016) 1 Cal.App.5th 221, 228-229, review granted Sept. 14, 2016, S235901.)

We agree with those decisions and need not repeat their reasoning at length here. Briefly, however, nothing about the language, intent, or purposes of Proposition 47 overcomes the presumption that no part of the Penal Code is retroactive unless expressly provided. (See *In re Diaz*, *supra*, 8 Cal.App.5th at p. 820; *People v. Johnson*, *supra*, 8 Cal.App.5th at pp. 119-122; *People v. Jones*, *supra*, 1 Cal.App.5th at pp. 229-230.) The cases McCurdy cites that hold that a prior prison term served for an offense reduced to a misdemeanor *before* a section 667.5(b) enhancement is imposed are inapposite,

because they apply Proposition 47 prospectively, not retroactively. (See, e.g., *People v. Call* (2017) 9 Cal.App.5th 856, 863-864; *People v. Abdallah* (2016) 246 Cal.App.4th 736, 739-740, 743, 747; see also *People v. Park* (2013) 56 Cal.4th 782, 802.)

McCurdy also makes the cursory contention that the trial court's refusal to strike the section 667.5(b) enhancement violated his federal due process rights by "fail[ing] to honor the procedures attendant to a state-created liberty interest." The only authority on which he relies, *Hicks v. Oklahoma* (1980) 447 U.S. 343, concerned a defendant's state right to have punishment fixed by a jury, and he makes no attempt to explain how that case applies to Proposition 47. His claim fails.

III. DISPOSITION

The trial court's orders of September 13, 2016, and May 12, 2017, are affirmed.

Humes, P.J.

We concur:

Dondero, J.

Banke, J.